

<sup>3</sup> *D.B.*, Docket No. 19-0648 (issued October 21, 2020).

## **ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

On July 27, 2015 appellant, then a 55-year-old postal clerk, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral rotator cuff tears and severe bilateral arthritis of the hands as a result of repetitive physical work duties. He noted that he first became aware of his condition on June 22, 2015 and of its relationship to factors of his federal employment on July 2, 2015. Appellant stopped work on July 23, 2015 and he did not return.

In a statement dated July 27, 2015, appellant detailed the duties of his federal employment position as a postal clerk that he alleged caused his conditions. He stated that he worked as a morning distribution clerk and assisted in unloading mail trucks. Unloading mail trucks consisted of pulling and pushing large parcels, pallets, flats, and letters. Appellant would toss parcels into a carrier's gurney, separate letters and flats, and prepare letters, flats, and parcels to be distributed. He noted that, on July 21, 2015, he was tasked to distribute tubs of flats and place them into carrier cases, which he did, and afterwards his hands were swollen and his shoulders hurt. The next day, finding that his hands were still swollen and his shoulders still hurt, appellant made an appointment with a physician.

OWCP initially received a July 23, 2015 report from Dr. Daniel Newman, a Board-certified orthopedic surgeon, who diagnosed bilateral rotator cuff tears and severe bilateral hand arthritis. He concluded that appellant was totally disabled from work.

In a development letter dated August 25, 2015, OWCP advised appellant that the evidence of record was insufficient to establish his claim. It requested that he submit a report from his treating physician which explained how the alleged factors of employment caused his diagnosed conditions. Appellant was afforded 30 days to submit the necessary evidence.

By decision dated October 7, 2015, OWCP denied appellant's claim, finding that he had not submitted sufficient evidence to establish causal relationship between his diagnosed conditions and the accepted factors of his federal employment.

In a November 12, 2015 letter, Dr. Newman noted that appellant had been a patient for many years and was recently treated for bilateral shoulder pain. He noted that appellant had recently undergone a surgical procedure on his left shoulder to relieve symptoms of impingement and that he would likely require the same surgery on his right shoulder. Dr. Newman opined that "the impingement problems that we have been treating [are] directly related to [appellant's]

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<sup>4</sup> Docket No. 18-0173 (issued August 21, 2019).

work[,] which requires repetitive pushing and pulling, reaching forward, and reaching above shoulder levels when sorting mail.” He noted that appellant had not sustained other injuries to the shoulders.

On November 25, 2015 appellant requested reconsideration. By decision dated April 28, 2016, OWCP denied modification of its October 7, 2015 decision finding that, although Dr. Newman’s November 12, 2015 report contained some support for causal relationship, he appeared to be repeating the history of injury provided by appellant instead of providing his own medical reasoning to explain how the conditions of his shoulders and hands were caused or aggravated by the accepted factors of appellant’s federal employment.

Dr. Newman responded to OWCP’s decision, in a letter dated May 19, 2016 in which he restated that appellant performed repetitive motion at work, including sorting mail, which involved working above the shoulder level. He further reiterated that appellant also performed significant lifting and heavy pushing. Dr. Newman explained that as to the similarity between his account and appellant’s, it was typical for physicians, when interviewing patients, to take a history including subjective complaints and the mechanism of injury. He advised that he had not copied appellant’s account, but merely reported the same information that he received from appellant as to the duties of his federal employment and his mechanism of injury.

On June 6, 2016 appellant again requested reconsideration. By decision dated August 22, 2016, OWCP denied modification of its April 28, 2016 decision, finding that Dr. Newman’s May 19, 2016 letter was insufficient to establish appellant’s claim.

Appellant requested reconsideration on October 28, 2016. OWCP received a September 12, 2016 report from Dr. Newman in which he opined that the repetitive motion required by appellant’s job contributed substantially to his condition.

OWCP denied modification on January 12, 2017.

In a report dated January 24, 2017, Dr. Newman noted that he first saw appellant in July 2015 with complaints regarding his shoulders and hands. At the time, appellant had been placed in a position where he was doing more sorting of mail in front of him and above shoulder level. He was also asked to lift and push objects that were quite heavy, a task he had not done before in his employment. Dr. Newman noted that left shoulder surgery had occurred, but appellant was still awaiting permission to proceed with right shoulder surgery. He opined that “in July, because of the change and increased work requirements, [appellant] had a flare up and exacerbation of his underlying arthritic conditions.” Dr. Newman further opined that appellant’s current condition “is directly related to the change in activities of July 2015. He has a repetitive motion injury in both shoulders and both hands with underlying degenerative arthritis.”

Appellant requested reconsideration on February 3, 2017. By decision dated May 3, 2017, OWCP denied modification.

In a report dated May 23, 2017, Dr. Newman noted that it was his position that appellant was treated in June 2015 for shoulder pain and hand pain that was directly related to increased work duties that began in January of that year. He noted that appellant stopped working in July 2015 due to failure of conservative treatment and that surgery had been considered.

Dr. Newman opined that he had “an aggravation and exacerbation of an underlying condition directly related to work activities that has not resolved, therefore his current condition is work related.” He clarified that his opinion regarding appellant’s condition was both that his “preexisting” arthritis of his shoulders and thumbs was a result of 31 years of repetitive motion at work and also that in 2015, as a result of a change in his employment duties, he had experienced an aggravation of the underlying condition.

Appellant requested reconsideration on June 9, 2017. By decision dated August 25, 2017, OWCP denied modification of its May 3, 2017 decision, finding that Dr. Newman’s May 23, 2017 report was insufficient to establish appellant’s claim.

On October 30, 2017 appellant appealed the May 3 and August 25, 2017 decisions of OWCP to the Board. By decision dated August 21, 2019, the Board affirmed OWCP’s May 3 and August 25, 2017 decisions, finding that the medical evidence of record was insufficient to establish causal relationship between appellant’s bilateral hand and shoulder conditions and the accepted factors of his federal employment.

On August 24, 2020 appellant requested reconsideration.

In an attached letter dated August 13, 2020, Dr. Newman described appellant’s shoulder condition as chronic impingement syndrome, explaining that the mechanism of impingement was secondary to what happened during the forward extension of the arm to above the shoulder level. He stated that, as this activity was performed, the greater tuberosity of the humerus came into contact with the undersurface of the acromion, pinching the soft tissues in between, including the subacromial bursa, which frequently became inflamed and could cause tearing of the rotator cuff. Dr. Newman opined that appellant’s federal employment duties required him to repetitively flex both arms multiple times per hour and that these duties caused impingement syndrome and rotator cuff tears. He further opined that appellant’s arthritis in the carpometacarpal joints of the bilateral hands were directly related to appellant’s repetitive duties at work. Dr. Newman stated that appellant was disabled.

By decision dated September 22, 2020, OWCP denied appellant’s request for reconsideration of the merits of the claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>5</sup> OWCP has discretionary authority in this regard and has imposed certain

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<sup>5</sup> This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his] own motion or on application.” 5 U.S.C. § 8128(a).

limitations in exercising its authority.<sup>6</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>7</sup>

OWCP procedures require a review of the file to determine whether the application for reconsideration was received within one year of a merit decision. The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include prerecoupment hearing decisions.<sup>8</sup> Timeliness is determined by the document receipt date of the reconsideration request, *i.e.* the received date in the Integrated Federal Employees Compensation System (iFECS). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.<sup>9</sup>

OWCP will consider an untimely request for reconsideration only if it demonstrates clear evidence of error on the part of it in its most recent merit decision. The request must establish, on its face, that such decision was erroneous.<sup>10</sup> The term clear evidence of error is intended to represent a difficult standard. If clear evidence of error has not been presented, OWCP should deny the request by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.<sup>11</sup>

### ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.<sup>12</sup>

OWCP's regulations establish a one-year time limit for requesting reconsideration, which begins on the date of the original merit decision. The most recent merit decision was the Board's August 21, 2019 decision, which affirmed OWCP's decisions dated May 3 and August 25, 2017. As OWCP received his request for reconsideration on August 24, 2020, more than one year after the August 21, 2019 merit decision, the Board finds that the request was untimely filed.<sup>13</sup>

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<sup>6</sup> 20 C.F.R. § 10.607.

<sup>7</sup> *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4.a (February 2016).

<sup>9</sup> *Id.* at Chapter 2.1602.4b (February 2016); *see also* S.J., Docket No. 19-1864 (issued August 12, 2020); W.A., Docket No. 17-0225 (issued May 16, 2017).

<sup>10</sup> W.A., *id.*; D.O., Docket No. 08-1057 (issued June 23, 2009); Robert F. Stone, 57 ECAB 292 (2005).

<sup>11</sup> *Supra* note 8 at Chapter 2.1602.5(a) (October 2011).

<sup>12</sup> D.B., Docket No. 19-0648 (issued October 21, 2020); R.T., Docket No. 20-0298 (issued August 6, 2020).

<sup>13</sup> *Id.*

Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for compensation.<sup>14</sup>

The Board finds that appellant has not demonstrated clear evidence of error. The underlying issue is whether OWCP properly denied his occupational disease claim because the evidence of record was insufficient to establish that his bilateral shoulder and hand conditions were causally related to factors of his federal employment. The Board finds that the evidence submitted by appellant in support of his request for reconsideration did not raise a substantial question as to the correctness of the denial of his claim.<sup>15</sup>

In support of appellant's request for reconsideration, OWCP received a letter from Dr. Newman dated August 13, 2020. The term clear evidence of error is intended to represent a difficult standard.<sup>16</sup> Dr. Newman's opinion was couched in speculative terms and did not manifest on its face that OWCP committed an error in denying appellant's claim and was not of sufficient probative value to raise a substantial question as to the correctness of OWCP's merit decisions. Thus, the Board finds that the evidence submitted on reconsideration does not demonstrate clear evidence of error on the part of OWCP in its May 3 and August 25, 2017 decisions.<sup>17</sup>

As appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error, the Board finds that OWCP properly denied appellant's request for reconsideration.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>14</sup> *Supra* note 11.

<sup>15</sup> *See R.T., supra* note 12.

<sup>16</sup> *Id.*

<sup>17</sup> *See W.R., Docket No. 18-1042* (issued February 12, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 22, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 18, 2021  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board